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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFREY LEE CLARK,

Defendant and Appellant.

F068645

(Super. Ct. No. 10931)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Mariposa County. Wayne R. Parrish, Judge.

Karriem Baker, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Franson, Acting P.J., Peña, J. and Smith, J.

## **INTRODUCTION**

Defendant Jeffrey Lee Clark contends the trial court erred when it ordered him to pay attorney fees and the cost of a presentence investigation report because there was insufficient evidence of his ability to pay. We will affirm. We note, however, an error in the abstract of judgment requiring correction.

## **RELEVANT PROCEDURAL BACKGROUND<sup>1</sup>**

Defendant was charged with murder in violation of Penal Code<sup>2</sup> section 187, subdivision (a). Following jury trial, he was convicted of the lesser included offense of voluntary manslaughter (§ 192, subd. (a)).

At sentencing, after imposing the six-year middle term, the trial court imposed, among other fines and fees, a court appointed counsel fee of \$150 and a presentence investigation fee of \$300.

## **DISCUSSION**

Defendant asserts there is insufficient evidence of his ability to pay \$150 in attorney fees and \$300 for the preparation of a presentence investigation report. He contends the order for attorney fees must be stricken because the trial court failed to make an ability-to-pay finding, and there is insufficient evidence of his ability to pay. Defendant further maintains the presentence investigation fee must also be reversed because defendant did not waive his right to a hearing, nor was he given notice of his right to a hearing, coupled with the fact there is insufficient evidence of his ability to pay. Lastly, defendant argues these orders violated his state and federal due process rights. The People argue defendant has waived these claims of error for purposes of appeal. However, the People acknowledge that if the claim is not waived, there is insufficient evidence in the record to support the trial court's order of defendant's ability to pay either of the fees imposed.

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<sup>1</sup>We forgo a recitation of the facts as they are not relevant to the issues on appeal.

<sup>2</sup>All further statutory references are to the Penal Code unless otherwise indicated.

## ***Forfeiture***

The People initially assert forfeiture in response to defendant's claims. Hence, the first question we address is whether defendant forfeited his right to claim the aforementioned errors on appeal. We conclude he has.

### **Section 1203.1b**

Section 1203.1b sets forth the procedure a trial court must follow before it may impose a fee for presentence probation costs. First, the court must order the defendant to report to the probation officer, who will then determine the defendant's ability to pay. (§ 1203.1b, subd. (a).) After the probation officer determines the amount the defendant can pay, the probation officer must inform the defendant that he or she is entitled to a hearing, during which the court will determine the defendant's ability to pay and the payment amount. (*Ibid.*) Section 1203.1b entitles the defendant to representation by counsel during this hearing. The defendant may waive his right to a hearing, but must do so knowingly and intelligently. (*Ibid.*) If the defendant fails to waive the right to a hearing, the probation officer must refer the matter back to the trial court, and the trial court will determine the defendant's ability to pay. (§ 1203.1b, subd. (b).)

It is now settled that a defendant who fails to challenge the imposition of fees pursuant to section 1203.1b before the trial court forfeits the claim on appeal. In the recent case of *People v. Trujillo* (2015) 60 Cal.4th 850 (*Trujillo*), the Supreme Court stated: "Notwithstanding the statute's procedural requirements, we believe to place the burden on the defendant to assert noncompliance with section 1203.1b in the trial court as a prerequisite to challenging the imposition of probation costs on appeal is appropriate." (*Id.* at p. 858.) The court explained:

"Our reasoning in [*People v. Scott*] [(1994) 9 Cal.4th 331] applies by analogy here. 'Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention.' (*Scott, supra*, 9 Cal.4th at p. 353.) In the context

of section 1203.1b, a defendant's making or failing to make a knowing and intelligent waiver occurs before the probation officer, off the record and outside the sentencing court's presence. Although the statute contemplates that when the defendant fails to waive a court hearing, the probation officer will refer the question of the defendant's ability to pay probation costs to the court, the defendant—or his or her counsel—is in a better position than the trial court to know whether the defendant is in fact invoking the right to a court hearing. In *Scott* the existence, per se, of procedural safeguards in the sentencing process, such as the right to counsel and to present evidence and argument, did not prevent us from holding the forfeiture rule should apply with respect to the trial court's discretionary sentencing choices. The same conclusion follows with respect to the imposition of the fees challenged here.” (*Trujillo, supra*, 60 Cal.4th at p. 858, fn. omitted.)

In reaching its conclusion, the California Supreme Court noted that important constitutional rights are not at stake in this case.

“Thus, unlike cases in which either statute or case law requires an affirmative showing on the record of the knowing and intelligent nature of a waiver, in this context defendant's counsel is in the best position to determine whether defendant has knowingly and intelligently waived the right to a court hearing. It follows that an appellate court is not well positioned to review this question in the first instance.” (*Trujillo, supra*, 60 Cal.4th at p. 860.)

The presentence report, dated December 2, 2013, recommended a “felony pre-sentence investigation report fee of **\$300**.” (Emphasis in original.) At sentencing on December 10, 2013, the trial court inquired whether the parties had “had an opportunity to review the report of the probation officer” and whether either had “[a]ny corrections or additions.” Defense counsel responded, “No, your Honor.” Neither did defense counsel address the issue in his argument pertaining to the sentence. The trial court thereafter imposed “a pre—felony pre-sentence investigation report [fee] in the amount of \$300.”

We are bound by the Supreme Court's decision. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Thus, pursuant to *Trujillo*, we conclude defendant has forfeited his challenge to the trial court's imposition of the probation report costs.

## ***Attorney Fees***

Subdivision (b) of section 987.8 provides in pertinent part

“In any case in which a defendant is provided legal assistance, either through the public defender or private counsel appointed by the court, upon conclusion of the criminal proceedings in the trial court, or upon the withdrawal of the public defender or appointed private counsel, the court may, after notice and a hearing, make a determination of the present ability of the defendant to pay all or a portion of the cost thereof. The court may, in its discretion, hold one such additional hearing within six months of the conclusion of the criminal proceedings. The court may, in its discretion, order the defendant to appear before a county officer designated by the court to make an inquiry into the ability of the defendant to pay all or a portion of the legal assistance provided.”

Ability to pay is based on the defendant’s “overall capacity ... to reimburse the costs, or a portion of the costs, of the legal assistance provided to him or her.” (§ 987.8, subd. (g)(2).) In making that determination, the court is to consider “[t]he defendant’s present financial position.” (§ 987.8, subd. (g)(2)(A).) Absent “unusual circumstances,” however, “a defendant sentenced to state prison shall be determined not to have a reasonably discernible future financial ability to reimburse the costs of his or her defense.” (§ 987.8, subd. (g)(2)(B).)

In *People v. Aguilar* (2015) 60 Cal.4th 862, decided the same day as *Trujillo*, the question was whether the defendant forfeited the issue of his ability to reimburse the cost of the sentencing report under section 1203.1b and reimburse the cost of appointed counsel under section 987.8. (*People v. Aguilar, supra*, 60 Cal.4th at p. 864.) On appeal, the defendant in *Aguilar* contended he was not advised of his right to a hearing, he did not waive such right, and the trial court erred in imposing the fees without finding he had the ability to pay. (*Id.* at p. 865.) The court found its decision in *Trujillo* controlling. (*Id.* at p. 866.) Like the defendant in *Aguilar*, we note nothing prevented defendant here from demanding a hearing on the issue of his ability to pay. (*Ibid.*) The *Aguilar* court concluded application of the forfeiture rule was particularly appropriate because “under the procedures contemplated by sections 987.8 and 1203.1b, defendant had two

opportunities to object to the fees the court imposed, and availed himself of neither.” (*People v. Aguilar, supra*, at p. 867.) Thus, the court concluded defendant forfeited the issues for appeal. (*Id.* at p. 868.)

Here, the previously prepared presentence report recommended a “Court appointed defense counsel fee of **\$150**.” (Emphasis in original.) As noted above, at sentencing the trial court inquired of counsel whether he had any comments regarding the probation report; defense counsel responded in the negative. Counsel never argued against recommendation of imposition of an order regarding attorney fees. The trial court thereafter imposed “a court-appointed defense counsel fee in the amount of \$150.”

Given the *Aguilar* decision, we conclude defendant has forfeited his challenge to the trial court’s imposition of a court-appointed defense counsel fee. (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455.)

### ***Abstract of Judgment***

Item 1 of the abstract of judgment filed December 10, 2013, incorrectly indicates defendant was convicted in a court trial instead of a jury trial.

### **DISPOSITION**

The trial court is directed to prepare a corrected abstract of judgment to properly reflect defendant was convicted in a jury trial. The trial court shall forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.